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IN THE

# Supreme Court of the United States

October Term, 1947

No. .....

TRANS-PACIFIC CORPORATION, a Corporation; NUEBART STAMPING AND MANUFACTURING COMPANY, a Corporation; COMMUNICATIONS EQUIPMENT CORPORATION, a Corporation, and COLUMBIA STAMPING AND MANUFACTURING CORPORATION, a Corporation,

*Petitioners,*

*vs.*

GEORGE T. GOGGIN, Trustee in Bankruptcy.

## Petition for Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Your petitioners, Trans-Pacific Corporation, a Corporation; Neubart Stamping and Manufacturing Company, a Corporation; Communications Equipment Corporation, a Corporation, and Columbia Stamping and Manufacturing Corporation, a Corporation, respectfully petition for certiorari in the Supreme Court of the United States to review the decision and judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court of the United States for the Southern District of California, Central Division, and the Referee in Bankruptcy, and in respect thereto allege as follows:

## Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes, and by Title 11, Section 47, United States Codes.

The District Court of the United States for the Southern District of California, Central Division, affirmed the decision of the Referee on June 2, 1947 [R. 145]. The Circuit Court of Appeals affirmed the judgment of the District Court on March 25, 1948 [R. 166]. Petition for rehearing was filed within the time allowed by law and was denied April 28, 1948 [R. 178]. Petition for certiorari is being filed in May, 1948, within the time allowed by law.

## Opinions Below.

The District Court affirmed the Referee in a memorandum opinion, which is found on page 137 of the record. The Circuit Court of Appeals affirmed without opinion [R. 166]. Also 166 F. (2d) 1021 and 76 Fed. Supp. 623.

## Statutes Involved.

Sections 39, 58, 59(g), 312(2), 322, 334, 335, 336, 376(2) of the Bankruptcy Act.

Title 11, United States Code Annotated, Section 42.

Seventh Amendment to the Constitution of the United States.

The provisions of the foregoing sections and the Seventh Amendment are set out in the appendix hereto.

## Short Statement of the Facts.

The four corporate petitioners herein, whose stock was in turn owned by one individual, found themselves confronted by a tax burden for excess profits of approximately $950,000.00 on October 28, 1946 [R. 3]. Aside from such tax burdens, the petition in bankruptcy of each of the corporations showed substantial assets. The petitioner corporations allege that the operating corporations can operate under their contract at a substantial profit and that the difficulties arose by reason of the tax obligations to the Government.

After the petitioners had filed their applications to be permitted to file a plan of arrangement under Chapter XI of the Bankruptcy Act, a notice was sent out by the Referee on October 29, 1946, only to the creditors of Trans-Pacific Corporation, a debtor, and not to the creditors of the other corporations. Said notice was set out as follows [R. 169]:

> "In the District Court of the United States, Southern District of California, Central Division. In Bankruptcy No. 44,604-BH. In the Matter of Trans-Pacific Corporation, a corporation, Debtor.
>
> NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI, SECTION 322 OF THE BANKRUPTCY ACT; OF TIME FOR FILING APPLICATION TO CONFIRM ARRANGEMENT, AND HEARING ON CONFIRMATION AND OBJECTIONS THERETO.
>
> To the Creditors of Trans-Pacific Corporation, a corporation, Debtor, of 1026 Pacific Mutual Building, 523 West 6th Street, Los Angeles, California, and District aforesaid:

Notice is Hereby Given that on the 29th day of October, 1946, Trans-Pacific Corporation, a corporation, filed a petition in this Court proposing an arrangement with its creditors under the provisions of Chapter XI, Section 22, of the Acts of Congress relating to Bankruptcy, and that a meeting of its creditors will be held in the courtroom of the undersigned Referee, 339 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 19th day of November 1946, at 10:00 a. m., at which time and place the said creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor, present written acceptances of the proposed arrangement, and transact such other business as may properly come before said meeting.

Notice is Further Given that the application to confirm said arrangement shall be filed with this court on or before the 19th day of December, 1946; and that the hearing on the confirmation thereof, or objections thereto, if any, shall be and is hereby set for the 19th day of December, 1946, at 10:00 a. m. at the above address.

Notice is Further Given that on December 19, 1946, at 10:00 a. m., should the creditors not consent to the proposed Plan of Arrangement, or should the Court not confirm the said Plan, the Court will, under the provisions of Section 376(2) of Chapter XI determine whether the proceedings should be dismissed or an order of adjudication be made herein, whichever may be in the best interest of creditors.

Notice Is Further Given that only creditors having claims on file may vote for the appointment of a trustee or creditors' committee and for confirmation or rejection of the proposed arrangement.

A summary of the liabilities, as shown by the schedules, is as follows:

| | |
|---|---|
| Taxes due United States | $62,983.05 |
| Taxes due States | 7,470.00 |
| Taxes due counties, etc. | 162.17 |
| Unsecured claims | 21,687.46 |
| Total Liabilities | $92,302.68 |

A summary of the assets, as shown by the schedules, is as follows:

| | |
|---|---|
| Cash on hand | $ 45.00 |
| Negotiable and non-negotiable instruments and securities | Uncertain |
| Debts due in open accounts | 30,000.00 |
| Policies of insurance | Uncertain |
| Unliquidated claims | 5,462.17 |
| Total assets | $35,507.17 |

The debtor's proposed Plan of Arrangement is attached hereto and marked Exhibit 'A.'

For further particulars, reference is hereby made to said petition on file in the office of the undersigned.

Dated: November 1, 1946.

HUGH L. DICKSON,
Referee in Bankruptcy."

At the meeting of December 19, 1946, no plan of arrangement was submitted as to any of the four corporations. Another hearing was held on January 30, 1947, without any further notice to Trans-Pacific Corporation or its creditors or other persons interested, and another meeting was held on February 27, 1947, without any further notice being sent out to Trans-Pacific Corporation, the debtor, creditors or other persons interested

in Neubart Stamping and Manufacturing Company, Communications Equipment Corporation, the Columbia Stamping and Manufacturing Corporation.

At the meeting on February 27, 1947, petitioners demanded in writing that their petition be dismissed [R. 152], and demanding, in the event that the motion for dismissal was denied, a trial by jury be allowed to determine the status of the petitioners. At first the referee stated that if expenses were paid he would grant the motion. Then on objections of a couple of bankruptcy attorneys but without taking any testimony, he denied the motion and summarily adjudicated the petitioners bankrupt, and arbitrarily transferred all of the properties of the corporations into the bankruptcy estate to be disposed of as bankrupt property.

No notice was sent out by the referee to the creditors or others, pursuant to the requirements of the Bankruptcy Act, that the petitioners, having proceeded voluntarily, requested a dismissal of the proceedings, and no hearing within the meaning of that word was held.

**Questions Presented by This Petition.**

(1) Whether the statutory notices required by the Bankruptcy Act have been complied with where petitioners filed under section 322 of the Bankruptcy Act, and no other notices are sent out except the notice to the creditors of one corporation, where there are actually four corporations, and that notice combined a notice for a meeting of the creditors together with a notice that adjudication may take place a month later.

(2) Whether a notice is required not only to the creditors, but also to the debtor and other persons interested.

(3) Whether a separate and distinct notice is required to call a meeting for proceedings under Chapter XI, section 322, and another notice in the event that the meeting to confirm the arrangement and the hearing on the confirmation and objections thereto has not succeeded.

(4) Whether, if the petition be construed as a voluntary petition in bankruptcy, the debtor has a right to ask for a dismissal of the proceedings, and whether thereafter it becomes the mandatory duty of the referee to send out notices for a hearing regarding the motion to dismiss and postpone the proceedings to permit a hearing on such notice, or whether the referee in bankruptcy can arbitrarily deny the motion to dismiss and thereafter summarily adjudicate the petitioner corporations bankrupt.

(5) Whether the referee in this case acted arbitrarily and capriciously.

(6) Whether the act of the corporations in opposing adjudication constitutes the corporations as involuntary bankrupts and entitles them to a jury trial on their status as to whether or not they are actually in bankruptcy.

(7) Whether in this status one is entitled to trial by jury under the Seventh Amendment to the Constitution of the United States.

(8) Whether the referee acted arbitrarily and capriciously in transferring all of the properties into the bankrupt estate without any hearing being offered to any of the creditors or other persons interested, and only upon the statements of a couple of attorneys interested in the outcome of the estate.

## Reasons for Allowing the Writ.

I.

The petitioners raise fundamental questions of importance regarding the statutory duty of the referee in giving proper notices and proper hearing on notice thereafter in bankruptcy proceedings.

II.

The District and Circuit Courts erred in their construction of the status of corporations which cannot meet their tax obligations to the Government and in holding that they may be summarily adjudicated bankrupt without a trial on the issues of that fact.

III.

The question of proper procedure under Chapter XI of the Bankruptcy Act is involved in the steps taken in this case which have not been decided by this court.

IV.

The case also raises fundamental questions of importance upon the construction of the right and power of the referee in bankruptcy, which have not heretofore been decided, but should be decided by this Honorable Court.

Wherefore, for each of the reasons set forth herein petitioners respectfully pray that this Honorable Court grant a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the proceedings had herein and to reverse the judgment and order, and for all other proper relief.

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioners.*

IN THE

# Supreme Court of the United States

October Term, 1947.

No. .....

TRANS-PACIFIC CORPORATION, a Corporation, NEUBART STAMPING AND MANUFACTURING COMPANY, a Corporation, COMMUNICATIONS EQUIPMENT CORPORATION, a Corporation, and COLUMBIA STAMPING AND MANUFACING CORPORATION, a Corporation,

*Petitioners,*

*vs.*

GEORGE T. GOGGIN, Trustee in Bankruptcy.

## BRIEF IN SUPPORT OF PETITION.

The petitioners adopt the Statement on Jurisdiction and all of the statutory provisions set out in the petition itself, together with the Statement of Facts therein contained.

## ARGUMENT.

### I.

### There Was Noncompliance With the Statutory Requirement Regarding Notice in This Case.

Chapter XI provides that all the provisions of the Bankruptcy Act shall apply to Chapter XI unless they are otherwise in conflict. (Sec. 302 of the Bankruptcy Act.)

Section 58, Title 11, Chap. 6, Sec. 94, U. S. C. A., provides that creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors. Subdivision c requires all notices shall be given by the referee unless otherwise ordered by the judge. The duty of the referee to give notice to creditors and all other parties in interest is provided by section 39a of the Bankruptcy Act. The only notice sent out in this case was the notice appearing on page 169 of the record:

> "In the District Court of the United States, Southern District of California, Central Division. In Bankruptcy No. 44,604-BH.
>
> In the Matter of Trans-Pacific Corporation, a corporation, Debtor.
>
> NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI, SECTION 322 OF THE BANKRUPTCY ACT; OF TIME FOR FILING APPLICATION TO CONFIRM ARRANGEMENT, AND HEARING ON CONFIRMATION AND OBJECTIONS THERETO.
>
> To the Creditors of Trans-Pacific Corporation, a corporation, Debtor, of 1026 Pacific Mutual Building, 523 West 6th Street, Los Angeles, California, and District aforesaid:"

There was no notice shown to have been sent out to the creditors of Neubart Stamping and Manufacturing Company, a Corporation, Communications Equipment Corporation, a Corporation, and Columbia Stamping and Manufacturing Corporation, a Corporation. The notice was only addressed to the one corporation.

Section 335 of the Bankruptcy Act requires that this notice be accompanied with a copy of the proposed ar-

rangement, a summary of the liabilities and of the appraisal or assets, as shown by the schedules.

**This notice had to be sent to each corporation and its creditors and persons interested. This was not done.**

It is our view that this notice did not contemplate containing a notice that, if the meeting of creditors and other persons interested was unsuccessful, the referee could then dismiss or make an order of adjudication of the corporations as bankrupts; otherwise, there would be no need to provide section 376(2) of the Bankruptcy Act.

The form shown in the form book does not contain the double notice to the creditors as set out at page 169 of the record (see Form 49).

Section 376(2) provides for a notice to be in compliance therewith of at least ten days in advance for the purpose of considering either a dismissal or an adjudication.

While there are no cases directly in point on this subject, the nearest approach is *In re H. Krieger & Co.*, 40 Fed. Supp. 340, 342, wherein the court on rehearing required that a notice of such rehearing should be given under section 376(2). Thus, it would be implicit in the Act as well as that decision that before a further proceeding could be had after the first notice to creditors in an attempt to adopt a plan or confirmation of arrangement, that a second notice should be given specifically as provided by section 376(2). No such notice was given in this case and, therefore, the statutory requirements were not complied with.

Section 376(2) provides not only that the debtor be given notice, but also the creditors and all other parties in interest that such a hearing is to be had, and for that purpose fixing a specific date. This was not done.

The only notice given in the case at bar was a notice of meeting of creditors in proceedings under Chapter 11, section 322, of the Bankruptcy Act, ofttime for filing application to confirm arrangement, and hearing on confirmation and objections thereto. The referee's certificate does not state that the notice was ever sent to the debtors, nor does it show any compliance as a matter of fact with all the provisions of section 376(2).

It must be a fair import and intent in examining Chapter 11, that there was no intent or purpose in the chapter in requiring or providing two different sections for notice, if the first single notice sent out would be sufficient. Therefore, section 376(2) contemplates a second notice to be given, if the plan of arrangement is going to fail and cannot be confirmed, for the referee then to notify the debtor and creditors, and other parties in interest, that such a hearing is to be had, and for that purpose fixing a date. This was not done.

Furthermore, it is the duty of the referee to give notice to creditors, the debtor and other parties in interest. Section 58 of the Bankruptcy Act provides for ten days' notice by mail.

Section 334 requires the court to promptly call a meeting of the creditors, upon at least ten days' notice by mail to the debtor, the creditors and other parties in interest.

Section 335 requires that the notice be accompanied with a copy of the proposed arrangement, a summary of the liabilities and of the appraisal or assets as shown by the schedules.

This same section provides:

> "Such notice may also name the time for the filing of the application to confirm the arrangement and

the time for the hearing of the confirmation and of such objections as may be made to the confirmation."

Section 336 goes on to state what may be done at such meeting or any adjournment thereof.

Section 335 does not allow this notice to include the notice required by section 376(2) if the arrangement is withdrawn or abandoned or not accepted by the creditors. Nor is there any mention in section 376(2) that the adjudication or dismissal may be made at any adjournment of the meeting required under sections 334 and 335.

Section 336 allows the court to do but four things at "such meeting, or at any adjournment thereof," which four things do not include the adjudication or dismissal.

Therefore, it would appear that the intent of section 376(2) by requiring notice to be given the debtor and creditors contemplated a new notice after the plan had been withdrawn or abandoned or not accepted. Here the referee attempted to give notice of all possible contingencies in one notice instead of confining himself to the matters permitted by the Act to be contained in one notice.

**This notice was sent to only one corporation and its creditors.**

All of these sections require notice to the *debtor, creditors and parties in interest.* There is nothing in the record showing that this notice was sent to the debtor. On page 20 of the printed transcript the referee states in his certificate on review: "On November 1, 1946, the referee mailed to all *creditors and parties in* interest a 'Notice of Meeting, etc.'" Therefore, it would appear that no notice was sent to the debtor as required by the Act.

It is also to be noted that only in case 44604-BH—the *Trans-Pacific* case—did the referee certify to the District

Court a copy of the notice. See printed transcript at page 28 in case 44604-BH "4. Copy of Notice of Meeting of Creditors." This is the notice of which certified copies are here filed. In the other cases [Tr. pp. 61, 92 and 123] only the order of adjudication and petition for review were certified up. The referee did not certify that notice had been given in the other cases.

It is to be noted that the referee corrected his certificate and set out a motion that the proceedings be dismissed, which request was made in advance of adjudication.

Now, then, if the proceedings were to be treated as a voluntary petition in bankruptcy under the provisions of the Bankruptcy Act, section 312, subdivision 2, then it became the duty of the court, where a motion was made to dismiss the proceedings, to give notice to the creditors and other parties in interest, as required by sections 39 and 58 of the Bankruptcy Act. This was never done.

Section 39 of the Act provides that the *referees* shall give notice to creditors and other parties in interest, as provided in this Act.

Section 58 provides for ten days' notice by mail to creditors of the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of the Act.

Section 59 provides that a voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of the parties, until after notice to the creditors as provided in section 58 of the Act, and the court shall

delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard.

Section 312(2) provides that where a petition is filed under section 322 the jurisdictions, powers and duties of the court shall be the same as if a voluntary petition in bankruptcy had been filed and a decree of adjudication entered at the time the petition was filed. See, also, section 341.

Therefore, the duty of the court being the same under section 322 as if a voluntary petition had been filed and with section 59g, requiring notice before a petition shall be dismissed, was it not required that notice be given of the written motion to dismiss and the hearing delayed a reasonable time to allow all creditors and parties in interest an opportunity to be heard instead of summarily denying the motion?

It is respectfully submitted that the specific requirements of the statute, section 376, require that before the court may enter an order it must do so:

(1) upon hearing;

(2) upon notice to

(a) the debtor;

(b) the creditors;

(c) such other persons as the court may direct.

While section 376, subdivision 2, does not state the type of notice or the form of notice to the creditor, the creditors and such other persons as the court may direct, since

Chapters 1 to 7, inclusive, are made a part of Chapter 11 in so far as they are not inconsistent therewith (section 302 of the Bankruptcy Act), we turn to section 58 (Title 11, Chapter 6, section 94, U. S. C.), which provides that creditors shall have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or afterwards filed with the papers in the case by creditors, and subdivision (c) requires "all notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by this Act may be waived in writing by any person entitled thereto." Subdivision (d) states:

> "Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct. The last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct."

The duty of the referee to give notice to creditors and all parties in interest is provided by section 39(a)(1). While the Act does permit notice of meeting of creditors, section 376, subdivision (2), only permits hearing after a specific notice to the debtor, the creditors, and such other persons as the court may direct, and does not permit a hearing at a different time or at any adjournment of that time. This contemplates a different and additional notice to the first one. Hence, the meeting of February 27, 1947, at which the orders of adjudication were made, is without notice.

The District Court erred in holding that the referee was within his jurisdiction in making the order, as it was not pursuant to and in keeping with section 376 of the Bankruptcy Act, which provides:

> "If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused the court shall
>
> * * * * * * * *
>
> (2) where the petition was filed under section 322 of this Act, enter an order, upon hearing *after notice to the debtor, the creditors, and such other persons as the court may direct,* either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

This court should grant certiorari to determine the important question of notice and the time and form it should be given.

## II.

### If the Petitioner Corporations Were to Be Treated as Voluntary Petitioners in Bankruptcy in the Event Their Plan of Arrangement Failed, Then Upon Their Motion to Dismiss It Was Mandatory Upon the Referee in Bankruptcy to Delay the Hearing for a Reasonable Time and Have Notices Sent Out.

The motion of the debtor to be dismissed was a motion it could make under the authority of section 302 of chapter 11, which incorporates the provisions of chapters 1 to 7, and it was its right to move the dismissal of a voluntary proceeding under section 59 of the Bankruptcy Act (Title 11, chapter 6, section 95). Subdivision g of this section is mandatory that, upon a motion to dismiss being made, notice shall be sent to the creditors of the pendency of such application and "shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard." Neither was the notice sent out, nor was there a delay for a reasonable time pursuant to the requirements of the statute treating the petitioners as voluntary bankrupts, but instead the court summarily adjudicated the debtor and granted no hearing on its application to be dismissed from the chapter proceedings.

## III.

**The Referee Acted Arbitrarily and Capriciously in Denying the Motion to Dismiss Without a Delay, in Compliance With the Statute. If the Petitioners, After Discovering That the Chapter XI Proceedings Were Not to Their Best Interests, Thereafter Moved to Dismiss the Proceedings, They Were Entitled to Have This Done, as There Are Many People Who Owe Money to the Government, but Who Are Still Not Bankrupt.**

When petitioners moved to dismiss the proceedings no testimony was taken. The referee at first said he would dismiss if the expenses were paid, then when objections were made by Mr. Goggin, the attorney for the trustee of the properties, and a couple of attorneys spoke up with objections, the referee, with nothing more, adjudicated the corporations bankrupt, over a written demand for trial by jury and objections that the taking of petitioners' properties was in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States [R. 152-157].

## IV.

### If Petitioners Were Forced Into Bankruptcy They Were "Involuntary" and as Such Were Entitled to a Jury Trial and Hearing on Their "Status" as to Whether They Were Bankrupt.

It is respectfully submitted that when the attorneys for a couple of creditors spoke up with objections, if their objections could be considered at all, it placed petitioners in the class of being forced involuntarily into bankruptcy and they were entitled to have their status as bankrupts adjudicated by trial by jury. This was a question of fact, because people who owe money to the Government are not necessarily in the status of a bankrupt. The District Court denied that such a right existed and the Circuit Court affirmed on the basis of the District Court's opinion.

It is respectfully submitted that the order of the referee took private property without due process of law, in violation of the Fifth Amendment to the Constitution, and that the referee's action was arbitrary and capricious, and in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

It is further contended that the statute, section 376(2), if construed as applied in this case, is unconstitutional as in violation of the Fifth Amendment to the Constitution.

The proceedings had were such that the Referee was willing to dismiss the proceedings until certain attorneys for certain creditors objected and sought to have the petitioner adjudicated a bankrupt. Their conduct was such, under the state of the record here, as to be comparable to

an involuntary petition in bankruptcy. They could have petitioned the court, had they so desired, to adjudicate the petitioner a "bankrupt under an involuntary petition" and if they had done so, he would have been entitled, without question, to a jury trial, Section 19(a) of the Bankruptcy Act.

Title 11, Chapter 4, Section 42, Section 19(c) of the Bankruptcy Act provides as follows:

> "The right to submit to a jury matters in controversy or an alleged offense under this Act shall be determined and enjoyed, except as provided by this Act, according to the laws of the United States now in force or such as may be hereafter enacted in relation to trials by jury,"

Under the procedure had, it was therefore the right of the petitioner to have the controversy as to whether his status was a bankrupt determined by a jury and not summarily and arbitrarily by the Referee because Mr. Seymour, the attorney for Donovan and Schuenke who had been the appellants' tax auditors, and Mr. Weller, another attorney had asked the court to adjudicate the petition in bankruptcy.

The right to a jury trial in a bankruptcy proceeding has long been preserved by Congress and the Supreme Court.

In *Elliott & Co. v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200, the court said:

> "The district courts as courts of bankruptcy are invested with 'such jurisdiction at law and in equity as

will enable them to exercise original jurisdiction in bankruptcy proceedings' in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Knickerbocker Ins. Co. v. Comstock,* 16 Wall. 258, 21 L. ed. 493; *Parsons v. Bedford,* 3 Pet. 448, 7 L. ed. 737; *Duncan v. Landis,* 45 C. C. A. 666, 106 Fed. 839.

By Sec. 41 of the bankruptcy act of 1867 it was provided that the courts should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy, and in *Knickerbocker Ins. Co. v. Comstock,* Mr. Justice Clifford, speaking for the court, said: 'Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil

actions at common law.' The 1st paragraph of Sec. 2 of the act was referred to, which provided 'that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity' (14 Stat. at L. 517, Chap. 176); and it was held that the case was excluded from the general superintendence and jurisdiction of the circuit court by the exception; and that, even admitting that decrees in equity rendered in the district court might be revised in a summary way if Congress should so provide, it was 'clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the circuit court in that way, as the Constitution provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law.' "

And, in *Knickerbocker Ins. Co. v. Comstock,* 83 U. S. 258, 21 L. Ed. 498, the court said:

"Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the district courts, but the 41st section of the bankrupt act expressly provides that the court shall, if the debtor, on the return day, or day of hearing, 'so demand in writ-

ing,' order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the alleged fact of such alleged bankruptcy. Regulations are also enacted as to the matters open to inquiry and the course of the trial, as follows: that if, upon such hearing or trial the debtor proves to the satisfaction of the court, 'when the hearing is summary, or of the jury, if one is demanded,' that the facts are set forth in the petition are not true, or that he, the debtor, has paid and satisfied all liens upon his property; in case the existence of such liens is the sole ground of the petition, the proceedings shall be dismissed and the respondent shall recover costs. 14 Stat. at L. 537."

The arbitrary and summary adjudication of the petitioner corporations as "bankrupts" and the removal of the property which belonged to him and to the corporations into the custody of the trustee in bankruptcy took the appellants' property without due process of law. There is no arbitrary power on the part of the court to take a corporation's property and declare him a bankrupt.

Subsection C of Section 19 says:

"(c) The right to submit matters in controversy, or an alleged offense under the provisions of this title, to a jury shall be determined and enjoyed, except as provided in this title, according to the United States laws in force in relation to trials by jury. (July 1, 1898, c. 541, sec. 19, 30 Stat. 551; Mar. 3, 1911, c. 231, sec. 289, 36 Stat. 1167.)"

## V.

**The Petitioners' Status Was Involved. This Is a Question of Fact as to Whether They Were in the Status of a Bankrupt. This Entitled Them to a Trial by Jury.**

The respondent is entitled to a jury upon everything which affects his solvency. (*Buffalo Milling Co. v. Lewisburg Dairy Co.*, 139 Fed. 379.)

The right of the debtor to a jury trial on the question of his solvency is absolute. The court cannot withhold the right at its discretion. (*Elliott v. Toeppner*, 187 U. S. 327, 47 L. Ed. 200.)

Under this section the right is not extended to intervening creditors. (*In re Book W. & Co.*, 232 Fed. 483.)

When a jury trial is demanded the trial is according to the common law. (*Moore v. Yampa Mercantile Co.*, 287 Fed. 629, and other cases so hold.)

Since the proceeding under Section 377 does not confess bankruptcy and the court must decide that question as a matter of fact. The question of the respondent's insolvency is in a sense outside the bankruptcy proceeding proper. It must be decided before the court has jurisdiction to proceed.

Collier on Bankruptcy (p. 427) expresses the opinion that "(c)" of Section 42 "clearly refers to controversies which are not strictly 'proceedings in bankruptcy' and give a right to jury trial."

Under the *Continental etc. Co.* decision, it is clear that the determination to be made as to the debtor's solvency is contestible, when for any reason the proposed plan of reorganization is not confirmed.

In the case of a person who petitions to compose his debts, he does not thereby admit insolvency or bankruptcy and he is entitled to receive a trial on that issue of fact the same as if he had been proceeded against on an involuntary petition. Indeed, under the factual situation of this case, it was not the debtor's desire to be declared a bankrupt but some of the creditor's desire to do so.

Amendment VII of the Federal Constitution reads:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (Ohlinger's Federal Practice 1, p. 112.)

It is noteworthy that this amendment stresses the preservation of the right of trial by jury and fails to mention suits in equity or the rules of courts of equity.

It has been said that in applying the Federal Rules of Procedure which distinguish between suits at common law and suits in equity "the true basis of separate procedure at law and in equity has been recognized by many judges" as "the right of trial by jury." (*Bennett v. Butterworth,* 52 U. S. (11 How.) 669, 674, 1850.)

It is well established that the right to a trial by jury as guaranteed by the Seventh Amendment means a trial in the mode and according to the settled rules of the common law, including all of the essential elements recognized in this country and England when the Constitution was adopted. (*Patton v. U. S.*, 281 U. S. 276, 74 L. ed. 854, 858; *Dimick v. Scheidt*, 293 U. S. 474, 476.)

To determine these new and important issues petitioners pray that certiorari be granted.

reports of the completion thereof; and (10 safely keep,

Respectfully submitted,

MORRIS LAVINE,
*Attorney for Petitioners.*

## APPENDIX.

### SECTION THIRTY-NINE OF THE BANKRUPTCY ACT.

a. Referees shall (1) give notice to creditors and other parties in interest, as provided in this Act; (2) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts or cause the same to be done when the bankrupts fail, refuse, or neglect to do so; (3) examine all schedules of property, lists of creditors, and statements of affairs, filed as provided under this Act, and cause such as are incomplete and defective to be amended; (4) furnish or cause to be furnished such information concerning proceedings before them as may be requested by parties in interest; (5) declare dividends and cause to be prepared dividend sheets showing the dividends declared and to whom payable; (6) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts and secure the return of such papers after they have been used, or, if it be impractical to transmit the original papers, transmit certified copies thereof by mail; (7) upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; (8) prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and orders thereon, the petition for review, a transcript of the evidence or a summary thereof, and all exhibits; (9) transmit forthwith to the clerks all bonds filed with and approved by them, the originals of all orders made by them granting adjudications or dismissing the petitions as provided in this Act, and certified copies of all orders made and entered by

them, granting, denying, or revoking discharges, or confirming or refusing to confirm arrangements or plans or setting aside the confirmation of arrangements or wage-earner plans and reinstating the proceedings or cases, and reports of the completion thereof; and (10) safely keep, perfect, and transmit to the clerks, when the cases are concluded, the records herein required to be kept by them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) purchase, directly or indirectly, any property of an estate in any proceeding under this Act. Active full-time referees shall not exercise the profession or employment of counsel or attorney, or be engaged in the practice of law. Active part-time referees, and referees receiving benefits under paragraph (1) of subdivision d of Section 40 of this Act, shall not practice as counsel or attorney in any proceeding under this Act.

c. A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

SECTION FIFTY-EIGHT OF THE BANKRUPTCY ACT.

Notices. a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear

in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of (1) all examinations of the bankrupt, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: *Provided,* That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked, and the time when they will be examined and passed upon; (6) the proposed compromise of any controversy in which the amount claimed by either party in money or value exceeds $1,000; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 59 of this Act; and (8) all applications by receivers, ancillary receivers, marshals, trustees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: *Provided,* That where a creditors' committee has been appointed pursuant to this Act, the notice required by clauses (1), (4) and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

b. The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge (1) to the creditors, in the manner prescribed in subdivision a of this section (2) to the trustee and his attorney, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a

hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last-known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective addresses as filed by them with the court.

c. All notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by the Act may be waived in writing by any person entitled thereto.

d. Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

e. The clerk shall mail to the Commissioner of Internal Revenue a certified copy of every order of adjudication forthwith upon the entry thereof. The court shall, in every case, mail or cause to be mailed a copy of the notice of the first meeting of creditors to the Commissioner of Internal Revenue and to the collector of internal revenue for the district in which the court is located.

SECTION FIFTY-NINE OF THE BANKRUPTCY ACT OF 1938.
(United States Code, Title 11, Chap. 6, Sec. 95)

g. A voluntary or involuntary petition shall not be dismissed upon the application of the petitioner or petitioners, or for want of prosecution, or by consent of parties, until after notice to the creditors as provided in

section 58 of this Act, and to that end the court shall, upon entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, shall cause such notice to be sent to the creditors of the pendency of such application and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest an opportunity to be heard. If the bankrupt shall fail to file such list within the time fixed by the court, such list may be filed by the petitioning creditors according to the best of their knowledge, information and belief: Provided, however, That in the case of a dismissal for failure to pay the costs of the bankruptcy proceedings, such notice of dismissal shall not be required.

SECTION 312 OF THE BANKRUPTCY ACT.

Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the court shall be the same— . . .

(2) where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.

SECTION 322 OF THE BANKRUPTCY ACT.

If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication.

SECTION 334 OF THE BANKRUPTCY ACT.

The court shall promptly call a meeting of creditors, upon at least ten days' notice by mail to the debtor, the creditors, and other parties in interest.

SECTION 335 OF THE BANKRUPTCY ACT.

The notice of such meeting of creditors shall be accompanied by a copy of the proposed arrangement, a summary of the liabilities as shown by the schedules and a summary of the appraisal, if one has been made, or, if not made, a summary of the assets as shown by the schedules. Such notice may also name the time for the filing of the application to confirm the arrangement and the time for the hearing of the confirmation and of such objections as may be made to the confirmation.

SECTION 336 OF THE BANKRUPTCY ACT.

At such meeting, or at any adjournment thereof, the judge or referee—

(1) shall preside;

(2) may receive proofs of claim and allow or disallow them;

(3) shall examine the debtor or cause him to be examined and hear witnesses on any matter relevant to the proceeding; and

(4) shall receive and determine the written acceptances of creditors on the proposed arrangement, which acceptances may be obtained by the debtor before or after the filing of a petition under this chapter.

SECTION 376 OF THE BANKRUPTCY ACT.

If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors, or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall— . . .

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

TITLE 11, SEC. 42, U. S. A.

*Jury Trials.* a. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial or the case may be postponed.

c. The right to submit to a jury matters in controversy or an alleged offense under this title shall be determined and enjoyed, except as provided by this title, according to the laws of the United States now in force or such as may be hereinafter enacted in relation to trials by jury.

AMENDMENT 7, CONSTITUTION OF THE UNITED STATES.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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IN THE

# Supreme Court of the United States

October Term, 1947.

No. 846

TRANS-PACIFIC CORPORATION, a corporation, NEU-BART STAMPING COMPANY, a corporation, COMMUNICATIONS EQUIPMENT CORPORATION, a corporation, and COLUMBIA STAMPING AND MANUFACTURING CORPORATION, a corporation,

*Petitioners,*

*vs.*

GEORGE T. GOGGIN, Trustee in Bankruptcy,

*Respondent.*

## RESPONDENT'S BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court:*

The respondent, George T. Goggin, respectfully submits that the Petition for Writ of Certiorari filed by these petitioners should be denied for several reasons as will hereafter appear:

1. That said Petition, although setting up numerous statements of fact, not involved in the original review and

appeal, has not been verified as required by Section 39-c of the National Bankruptcy Act. (11 U. S. C. A., Section 41-c.)

2. That the Petition was not accompanied by a certificate of counsel, a member of the bar of this court, to the effect that in his opinion the Petition is well founded and is not interposed for delay. (See O'Brien's Manual of Federal Appellate Procedure, 3rd Edition, p. 289.)

That said Petition contains erroneous misstatements of fact as will be demonstrated from the record, which alleged facts were not made a basis for the review and appeal in the courts below.

## Statement of Facts.

The judgments sought to be reviewed by this court involve appeals by four closely related, interlocking corporations controlled entirely by one P. S. Seymour-Heath. These four corporations, namely the Trans-Pacific Corporation, a Nevada corporation [Tr. p. 2]; Columbia Stamping and Manufacturing Corporation, a California corporation [Tr. p. 35]; Neu-Bart Stamping and Manufacturing Company, a California corporation [Tr. p. 68]; and Communications Equipment Corporation, a California corporation [Tr. p. 99], filed their respective Petitions under Chapter XI, Section 322 of the National Bankruptcy Act (11 U. S. C. A., Section 722), in the United States District Court for the Southern District of California. These Petitions were filed simultaneously on October 29, 1946. [Tr. pp. 11, 44, 76 and 108.]

**All of These Corporations as Shown by Their Schedules and as Certified by the Referee to the District Judge Were Hopelessly Insolvent.**

The Trans-Pacific Corporation owed liabilities of $92,302,68, and possessed assets in an amount totalling $35,507.17; the Columbia Stamping and Manufacturing Company owed liabilities totalling $365,867.44, and possessed assets totalling $199,557.52; the Neu-Bart Stamping and Manufacturing Company owed liabilities totalling $512,724.08, and possessed assets amounting to $306,209.87; the Communications Equipment Corporation owed liabilities totalling $344,041.61 and possessed assets of $139,785.19. Included in these liabilities were the following tax liabilities owing to the United States:

| | |
|---|---|
| Trans-Pacific Corporation | $62,983.05 |
| Columbia Stamping and Manufacturing Corporation | 273,866.51 |
| Neu-Bart Stamping and Manufacturing Company | 496,754.10 |
| Communications Equipment Corporation | 304,686.13 |

[See Tr. pp. 113 to 115 incl.]

The Trans-Pacific Corporation was owned in its entirety, according to the Petition on file, by P. S. Seymour-Heath, and it in turn owned all of the common stock of the subsidiary corporations: Columbia Stamping and Manufacturing Corporation, Communications Equipment Corporation and the Neu-Bart Stamping and Manufacturing Company. [See Petition of Trans-Pacific Corporation allegation No. 4, Tr. p. 3.]

The proposal made to the creditors substantially provided that these hopelessly insolvent corporations would

immediately undertake the completion of pending negotiations with the Collector of Internal Revenue to reduce the excess profits tax claimed by the Government in the sum of $950,000.00 [Tr. p. 5], and then, if successful, pay general unsecured creditors as satisfaction in full, 50% of their respective claims, payable 5% as soon as such amount was available from the operations of the debtor corporations involved, and in no event later than six months from the date of the confirmation of the plan, and the balance thereof at the rate of 5% on each successive month from the first payment of 5%, with a maximum of eighteen (18) months from the date of the final order confirming the arrangement. [Tr. p. 7.] In the prayer for relief, these insolvent corporations asked the District Court to enter a final decree discharging each of the debtors with respect to the property and matters herein involved, and closing their respective estates [Tr. p. 8], and in allegation No. 4, B-1 of the Petition, petitioners alleged as follows:

> If the creditors and the court do not see fit to allow P. S. Seymour-Heath to operate the corporation as a debtor-in-possession, your petitioner alleges that then a Receiver should be appointed but that said Receiver should be directed and authorized to employ P. S. Seymour-Heath as manager, under the supervision and control of the Receiver and the Court, at a total compensation of $1,500.00 per month, in accordance with the allegations contained hereinabove. [Tr. p. 5.]

The respective Petitions were approved on the date of filing, by Honorable Paul J. McCormick, United District Judge, and were referred to Referee Hugh L. Dickson, one of the Referees in Bankruptcy in the District Court

of the United States, Southern District of California, Central Division. [Tr. p. 12.]

Notice was mailed to all creditors and parties in interest, of a meeting of creditors to be held on November 19th, 1946, at 10:00 A. M. before Referee Dickson. [See Referee's Certificate on Review, Tr. p. 15, at p. 20.] This meeting was called on November 19th pursuant to notice and George T. Goggin was elected Trustee in the event of liquidation. No written acceptances of the proposed arrangement were or had been filed. [See Referee's certificate on Review at p. 21.] The meeting was continued to December 19, 1946 at 10:00 A. M. [Tr. p. 21.]

On the latter date a further examination of the debtor was had and based on representations by the debtor that negotiations were pending for adjustment of the tax claims owing the United States, the Referee granted a further continuance to January 30, 1947.

On January 30th, 1947, an oral motion for an additional continuance of four or five weeks was made by the debtor through its then attorneys, Martin Gendel and J. S. McKnight. P. S. Seymour-Heath, the real owner of all of these corporations was present in the court room and took part in the proceedings and the request for continuance to February 27th, 1947 was granted on the ground that Morris Lavine was then in Washington, D. C. trying to work out an adjustment with the Commissioner of Internal Revenue. [See Referee's Certificate on Review at Tr. pp. 22, 25-26.] This continuance was acceded to and was characterized by Mr. Gendel as being a very fair continuance, and he thanked the court for the consideration. [Tr. p. 25.] The Referee here is now accused of acting arbitrarily and capriciously. (Petition for Certiorari, Subdivision 5, p. 7.)

On February 27, 1947, Mr. Morris Lavine came into the case as an attorney of record, for the first time. Up to that period the petitioners here had been represented by Messrs. Martin Gendel and J. S. McKnight, as attorneys of record. [See Referee's Certificate at Tr. p. 24, and p. 26.] No written acceptance of the proposed plan of arrangement had been filed when Mr. Lavine came in, nor had any plan acceptable to the United States Government been filed. No application had been made to confirm the arrangement and no funds of any kind nor in any amount, were then, nor have been since, deposited or offered to be deposited, to provide for payment in full of claims required to be paid in full under Chapter XI proceeding. [See Referee's Certificate on Review, Tr. p. 26.]

The debtor then made an oral motion that the proceedings be dismissed on condition that all costs of the proceedings would be paid by the debtors within twenty-four hours. All creditors with claims on file who expressed any opinion, recommended that an Order of Adjudication be made forthwith. No creditor requested either a continuance of any of the matters on the calendar or a dismissal of the proceedings. [Referee's Certificate on Review, p. 26, and p. 27.] The debtor then for the first time through Mr. Lavine, tossed a bombshell into the proceedings with a demand for a jury trial on the question of insolvency, when insolvency was admitted in the original pleadings filed on behalf of each of these petitioners, and of the commission of an Act of Bankruptcy, after each of these petitioners had requested that in the event P. S. Seymour-Heath was not permitted to operate the corporations as a debtor-in-possession, a Receiver should be appointed. The debtors claimed that under the 7th Amendment to the Constitution of the United States, and under

Section 19-a of the National Bankruptcy Act (11 U. S. C. A., Section 42-a), these hopelessly insolvent corporations were entitled to a trial by jury on utterly non-existent issues. The Referee very properly declined to take up the time of the court and a jury trying non-existent issues which would require a directed verdict, and declined to dismiss the petitions of these four insolvent corporations which had invoked the aid of the court to stay the hands of their creditors for several months, in a fruitless effort to force their creditors to take a prospective 50¢ on the dollar if and when debtors would negotiate a reduction of taxes with the U. S. Government, and ordered an adjudication of all of these corporations in accordance with the provisions of Section 327 of the National Bankruptcy Act (11 U. S. C. A., Section 727), from which order of adjudication these four bankrupts took a review.

The Petitions for Review in these cases were identical, and we shall content ourselves with quoting from the one filed by the Trans-Pacific Corporation, which commences at page 29 of the transcript. An examination of the Assignments of Errors brought before the District Court commencing at page 32 of the transcript, will disclose that the review was based on a challenge to the constitutionality of Sections 322 and 376 of the National Bankruptcy Act as being unconstitutional and in violation of the Fifth and Seventh Amendments to the Constitution of the United States. No question was raised in these Assignments of Errors of lack of notice, either to the creditors of these corporations or any of them, nor to the bankrupt, unless one exercises a great deal of imagination on the Eleventh Assignment of Error, which reads:

> "That the said order was not made pursuant to and in keeping with the keeping with the provisions of Bankruptcy Act." [Tr. p. 33.]

The prayer of the Petition for Review asks that Sections 322 and 376 of the National Bankruptcy Act be held unconstitutional and in violation of the Fifth and Seventh Amendments to the Constitution of the United States.

District Judge Ben Harrison, after the issues pertaining to the constitutionality of Sections 322 and 376 had been thoroughly briefed and argued, rendered an opinion which was adopted by the United States Circuit Court of Appeals for the Ninth Circuit. In neither of the lower courts was the question of lack of Notice to Creditors nor the bankrupt raised. In the Circuit Court of Appeals the points on which the appellants intended to rely on appeal were three in number: First that the appellants had been denied due process of law granted by the Fifth Amendment; second, that they were denied due process of law in that the decision of the Referee which District Court affirmed, was special, partial and arbitrary, and third, that the Referee had been guilty of an abuse of discretion in adjudicating the appellants as bankrupt. [See Designation of Points upon which Appellants Intend to Rely upon Appeal; Tr. pp. 61 and 62, also pp. 147 and 148.] At no time, until the oral argument in the Circuit Court of Appeals, was any mention made of notice or lack of notice, and the question was brought up incidentally in the course of the oral argument before the Circuit Court of Appeals by Mr. Lavine, and the Judges of that court made short shrift of that line of argument.

The question has now arisen here again and appears to be most strongly emphasized in appellants' brief in support of their Petition. We shall show very clearly that appellants are badly mistaken with regard to lack of notice.

## ARGUMENT, POINTS AND AUTHORITIES.

At page 10 of this argument in support of his contention that there was non-compliance with the statutory requirement of notice in this case, appellant makes the following erroneous statement:

> "There was no notice shown to have been sent out to the creditors of Neu-Bart Stamping & Manufacturing Corporation, a corporation, Communications Equipment Corporation, a corporation, and Columbia Stamping and Manufacturing Corporation, a corporation. The notice was only addressed to the one corporation."

This bald statement of fact is made by appellants after setting out the caption of the notice that was sent out in case No. 44604-B.H. in the matter of the Trans-Pacific Corporation, debtor. The statement that the notice was not sent out in the cases of the other three bankrupts is erroneous. On page 11 of his brief, cousel for the appellants says in heavy black type:

> "This notice had to be sent to each corporation and its creditors and persons interested." This was not done.

In preparing his brief, counsel must have inadvertently overlooked the verified statements set out in appellant's original Petition for Review, which indicate very clearly that notice *was* sent out in all of these companion cases. Appellant Trans-Pacific Corporation, a corporation, admits that such notice was sent out in its case, so we need

not concern ourselves with it. In the Petition of the Columbia Stamping and Manufacturing Corporation, No. 44605-B.H. for Review of the Referee's Order of Adjudication, we find the following in its Petition for Review [Tr. p. 62]:

> "The hearings were continued from time to time upon order of the Referee in Bankruptcy. *A further notice* was thereafter given by the said Referee that a hearing would be held on February 27, 1947 to consider any plan of arrangement that may be offered and that should the creditors not consent to the proposed plan of arrangement, or should the court not confirm the said plan of arrangement, that the court would, under the provisions of Section 376 (2) of Chapter XI of the (55) Bankruptcy Act, determine whether the proceedings should be dismissed or *an order of adjudication be made,* whichever might be in the interests of the creditors." (Italics ours.)

In the Petition for Review filed by the Neu-Bart Stamping and Manufacturing Company beginning at Transcript page 93, we find the exact language with regard to the further notice repeated *verbatim.*

In the Petition for Review filed by the Communications Equipment Corporation, at Transcript page 124, we find the identical language again repeated.

It seems strange that if no notice was sent out in the cases of these three allied corporations, each of them would have affirmatively asserted in their Petitions for Review before the District Court, that such notices *were*

sent out and that they expressly provided that if these petitioners were not prepared to proceed with their plan of arrangement on February 27th, the court would either dismiss the Petition or adjudicate them bankrupts.

But that is not all.

Referee Dickson in his Certificate on Review at page 16 of the transcript certified to the District Judge as follows:

> "On October 29, 1946, Trans-Pacific Corporation, a corporation, Columbia Stamping and Manufacturing Corporation, a corporation, Neu-Bart Stamping and Manufacturing Company, a corporation, and Communications Equipment Corporation, a corporation, each filed its Petition for arrangement under Section 322 and the respective numbers in this Court are,
>
> No. 44604-B.H.
> No. 44605-B-H
> No. 44606-B.H.
> No. 44607-B.H.
>
> Thereafter on October 29, 1946, after Orders duly made, each of said matters was referred generally to the undersigned as Referee in Bankruptcy for further proceedings, *all of which in respect to matters here involved have been held simultaneously.*" (Italics ours.)

We therefore respectfully submit that phantom issue of lack of notice in the cases of the three subsidiary corporations has been fully and completely disposed of.

**Petitioners Were Not Denied Any Constitutional Right by Reason of Refusal of a Jury Trial.**

We shall content ourselves with repeating a portion of our brief before the Circuit Court of Appeals in concluding this brief:

It would seem to us that these appeals boil themselves down to a very few simple questions to be determined by this court. It appears to be the contention of the appellants that their constitutional rights under the Seventh Amendment to the Constitution of the United States was violated by reason of the denial of a jury trial on the question of these appellants' insolvency. We respectfully submit that these complaints of invasion of the Constitutional rights of these corporations under the Seventh Amendment to the Constitution and the Due Process clause of the Fifth Amendment are absolutely untenable. We submit that this contention is frivolous for several reasons.

1. That the Seventh Amendment to the Constitution of the United States does not guarantee the right to a jury trial in a bankruptcy proceeding but only preserves it in an action at common law where the value in controversy exceeds the sum of $20.00.

2. That the only Constitutional provision relating to bankruptcy is contained in Section 8 of the Constitution of the United States and that Congress in enacting the Bankruptcy Act enacted it under the provision of the fourth paragraph of Section 8 of the Constitution.

3. That in enacting a National Bankruptcy Act under Section 8 of the Constitution, Congress provided in that Uniform Act, in Section 19, for jury trials *only in cases where an involuntary Petition has been filed against a bankrupt,* and such right to a jury trial is purely statutory and not a Constitutional right. (Italics ours.)

4. That bankruptcy proceedings are equitable in nature and are not actions at common law and that in a proceeding of an equitable nature the right to trial by jury is not a Constitutional right although the court sitting in an equitable proceeding may impanel a jury to render an advisory verdict which is not binding on the court.

5. That the demand for a jury trial on the question of the bankrupt's insolvency is frivolous and unfounded by reason of the fact that it affirmatively appears from the appellants' various debtors' petitions under Chapter XI that all of the appellant corporations were hopelessly insolvent the date of the filing of the petitions; that they were able to pay their creditors only 50 per cent of the debts which they owed and that no real issue of fact triable before a jury at the date of the filing of the petition existed. Furthermore, the debtors affirmatively alleged in their petitions [Tr. p. 5] that a receiver should be appointed to take over the assets of these insolvent corporations which was done, George T. Goggin being appointed receiver. [See allegation regarding appointment of Receiver at Transcript, p. 5, and Referee's Certificate that the Receiver was appointed at the bottom of Transcript, p. 16.] This combination alone would in itself require an adjudication in bankruptcy if the proposed plan of reorganization failed.

Section 3, Subdivision a of the National Bankruptcy Act, sets forth the Fifth Act of Bankruptcy as follows:

> "While insolvent or unable to pay his debts as they mature procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

That the appellant corporations were all insolvent and were unable to pay their debts as they matured is evident from even a cursory examination of the petitions filed, invoking the jurisdiction of this court and the schedules attached thereto. [Tr. pp. 3, 17, 18 and 19.] We are not repeating the facts in each of the cases, as the Referee certified [Tr. p. 19] that the proposed plan of arrangement in each case was the same in substance so far as material here. [Tr. p. 19.]

6. That there is no provision in the Bankruptcy Act for a jury trial in a voluntary case and no rights of the bankrupts have been infringed.

7. That a dismissal of the voluntary proceeding instituted by these bankrupt appellants would work a gross injustice on creditors of these appellants for the reason that many months elapsed between the date of the filing of the original voluntary petitions October 29, 1946, and the date of the Order of Adjudication on March 3, 1947; that in the event of dismissal of this proceeding, rights already vested in creditors and their representative, the trustee, to avoid fraudulent conveyances and preferences under Section 67, 70 and 60 of the National Bankruptcy Act would be forever lost by reason of lapse of time, with no benefits whatsoever to be gained by either the appellants or anyone else except creditors who may have obtained preferences which could be avoided in the event of adjudication, persons obtaining fraudulent conveyances or persons who may have been guilty of crimes under Section 29 of the National Bankruptcy Act, such as concealment of assets from a Receiver or Trustee in Bankruptcy or other offenses cognizable under Section 29b of the National Bankruptcy Act.

## Constitutional and Statutory Provisions.

The Seventh Amendment to the Constitution of the United States reads as follows:

> "In suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Section 8 of the Constitution of the United States as originally enacted, provides as follows:

> "The Congress shall have power * * * to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

Congress enacted the Bankruptcy Act of 1800, the Bankruptcy Act of 1841, the Bankruptcy Act of 1867, the Bankruptcy Act of 1898, and the National Bankruptcy Act of 1938 under this grant of power.

There does not appear, so far as we have been able to ascertain from our research, to have been any provision for trial by jury in any of the Acts preceding the Act of 1841. In that Act under Section 1 a provision was made for trial by jury in an involuntary case if demanded within ten days after its decree. This act strangely provided that if the person sought to be adjudged a bankrupt resided at a great distance from the place of sitting of the Bankruptcy Court the Judge in his discretion could direct such a trial by jury to be had in the County of such person's residence, in such manner and under such directions as the court may prescribe and

give, and that all such decrees passed by such court and not so re-examined should be deemed final and conclusive as to the subject matter thereof. It would seem that under the Act of 1841, by inference at least, the Court of Bankruptcy could refer the matter to a state court in the county of the bankrupt's residence for a jury trial.

The Act of 1867 provided in Section 41 thereof:

> "That on such return day or adjourned day, if the notice has been duly served or published or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time on good cause shown, and shall, if the debtor on the same day so demands in writing, order a trial by jury at the first term of the court in which a jury shall be in attendance to ascertain the fact of such alleged bankruptcy."

The Act of 1898 and the Act of 1938 in so far as material here, provided as follows in Section 19 thereof, 11 U. S. C. A., Section 42-a:

> "A person *against whom an involuntary petition has been filed* shall be entitled to have a trial by jury in respect to the question of his insolvency, except as otherwise provided, and of any Act of Bankruptcy alleged in such Petition to be committed upon filing a written application therefor at or before the time within which an Answer may be filed. If such application is not filed within such time a trial by jury shall be deemed to have been waived." (Italics ours.)

Section 1, Subdivision 23, defines "person" as follows:

> "Persons shall include corporations except where otherwise specified * * *."

Section 1, Subdivision 24, defines "petition" as follows:

> "Petition shall mean a document filed in a court of bankruptcy or with a clerk thereof by a debtor praying for the benefits of this Act or by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

Section 1, Subdivision 10, defines "courts of bankruptcy" as follows:

> "Courts of bankruptcy shall include the District Courts of the United States * * *."

Section 314 of Article 3, Chapter XI, amplifying Section 2 of the original Bankruptcy Act, provides:

> "The Court may in addition to the relief provided by Section 2 of this Act and elsewhere under this Chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may upon notice, and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of the debtor."

Section 321 of Article 4, Chapter XI, provides:

> "A debtor may file a petition under this Chapter in a pending bankruptcy proceeding either before or after his adjudication."

Section 322 provides:

> "If no bankruptcy proceeding is pending a debtor may file an original petition under this Chapter with the Court which would have jurisdiction of a petition for his adjudication."

Section 376 of Article 10, Chapter XI in so far as material here, provides as follows:

> "If an arrangement is withdrawn or abandoned prior to its acceptance or is not accepted at the meeting of creditors or within such further time as the court may fix * * *, or if confirmation of the arrangement is refused, the court shall—
>
> (2) Where the petition was filed under Section 322 of this Act enter an order upon hearing after notice to the debtor, the creditors and such other persons as the court may desire, *either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with* pursuant to the provisions of this Act, or dismissing the proceedings under this Chapter, whichever in the opinion of the court may be *in the interest of the creditors.*" (Italics ours.)

**The Law.**

Bearing these statutory provisions in mind we shall now submit to the Court the text matter and decisions supporting our position that no right of the bankrupt, Constitutional or otherwise, was violated when Referee Hugh L. Dickson adjudged these corporations to be bankrupts. Collier on Bankruptcy, 14th Edition, Volume Two, page 224, *et seq.*, reads as follows:

> "The right to a jury trial under Section 19a is one accorded the alleged bankrupt solely by the Bankruptcy Act and not by the provisions of the Seventh Amendment; trials without a jury in bankruptcy proceedings are not a violation of the Constitution.

Moreover, the right is one confined to the debtor only; Subdivision a confers no right to jury trial upon a creditor. As to the debtor the right upon demand is absolute and cannot be withheld at the discretion of the court, nor may the right to contest a proposed adjudication be refused because of disobedience of a court order * * * the demand must be filed at or before the time within which an answer may be filed * * * if no application is filed with the time limited, a trial by jury shall be deemed to be waived."

In the case at bar the demand for trial by jury, although made in writing, was not made at or before the time in which an answer could be filed by anybody to the debtors' voluntary petitions under Chapter XI. Nowhere in the act is any provision made for demanding a jury trial in the event the plan of arrangement has failed. All that is required is to give notice to the debtor that an adjudication will occur and we have been unable to find any provision for an answer on the part of the bankrupt to such notice. All that the bankrupt can do when such notice is granted is come in with an accepted plan of arrangement, a deposit of the funds necessary to pay the expenses of administration, and the prior claims under Section 64 of the National Bankruptcy Act. He might then thwart the threatened adjudication by complying fully with his plan of arrangement, his promise to his creditors and the court that the same would be consummated. That is the only thing he can do.

**The Filing of the Petitions by the Bankrupts Invoking the Jurisdiction of the Court Fixed Their Rights and the Rights of Their Creditors, Firmly and Definitely, as of the Date of the Filing of the Original Petitions.**

It has long been settled by a long and unchanged line of decisions, too numerous to set out *in extenso* here, that the filing of a petition under the Bankruptcy Act fixes, determines and vests the rights of all of the parties as of the date of the filing of the petition. In the early case of *Sexton v. Dreyfus*, 219 U. S. 339, 25 A. B. R. 363, the Court, speaking through the late Justice Oliver Wendell Holmes, and discussing the line of cleavage, says:

> "The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well known illustration of Chief Justice Shaw's (Parks v. Boston, 15 Pick. 198, 208), the whole matter could be settled in a day by a pie powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain. If under Section 57 of the present Act, the value of the security should be determined by agreement or arbitration, the time for fixing it naturally would be the date of the petition. At that moment the creditors acquire a right *in rem* against the assets. Chemical Nat. Bank v. Armstrong, 59 Fed. 372, 378, 379; Merrill v. National Bank, 173 U. S. 131. When there is delay in selling because of the hope of getting a higher price, it is more for the advantage of the secured creditor than of anyone else, as he takes the whole advance, and the others only benefit by a percentage, which does

not seem a good reason for allowing him to prove interest by indirection. Whenever the creditor proves, his security may be cut short. This is the necessarily possible result of bankruptcy. The rule under discussion fixes the moment in all cases at the date which the petition is filed; but beyond the fact of being compelled to realize his security and look for a new investment, there is no other invasion of the secured creditor's contract rights, and that invasion is the same in kind whatever moment may be fixed."

In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 27 A. B. R. 262, the Court said:

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224, where it is said:

'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and, in effect, an attachment and injunction. Bank v. Sherman, 101 U. S. 403. And on adjudication, title to the bankrupt's property became vested in the Trustee (Section 70-a) with actual constructive possession, and placed in the custody of the bankruptcy court.'"

Discussing this question still further, the Court said:

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdic-

tion with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition * * *. Under Section 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if its enforcement would work a preference. Provision is made for the prompt taking possession of the bankrupt's property, before adjudication if necessary (Section 69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purpose of the Act. These provisions, and others might be recited, show the policy and purpose of the Bankruptcy Act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the question of adjudication is determined. * * * It was the duty of the bankruptcy court, if it intended to administer the property under the bankruptcy law, to promptly determine the question of adjudication, to proceed with the selection of the trustee and the administration and distribution of the estate, as required by the Act."

This rule was followed and reiterated with approval in *Everett v. Judson,* 228 U. S. 474, 30 A. B. R. 1, in a case where a bankrupt died after the filing of an involuntary petition against him but before adjudication, leaving a substantial amount of life insurance. The trustee contended that the right to this life insurance became vested under Section 70-a as of the date when the adjudication occurred. The beneficiaries under the policies contended that the right had not accrued because the bankrupt was alive

at the time of the filing of the petition. The Supreme Court speaking through Mr. Justice Day, disposed of the trustee's contention as follows:

"While it is true that section 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, wherein it was held that, pending the bankrupt proceedings, and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. Zavelo v. Reeves, 227 U. S. 625, 29 A. B. R. 493. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. And it is as of that date that the surren-

der value of the insurance policies mentioned in section 70a should be ascertained. The subsequent suicide of the bankrupt before the adjudication was an unlooked-for circumstance which does not change the result in the light of the construction which we give the statute."

In that case there was a very substantial difference between the mere cash surrender value of the bankrupt's insurance policies and the benefits accrued therefrom subsequent to the filing of the petition but before the adjudication. In the case at bar the bankrupts in their petitions and schedules confessed their insolvency. As hereinbefore pointed out, the Referee certified that according to the Schedules of each of these petitioners they confessed that each and everyone of them were hopelessly insolvent. [Tr. pp. 50 to 52, incl.] This hopelessly insolvent condition on the part of each of these petitioners existed as of the date of the filing of the petition. Bearing in mind the foregoing principle repeatedly enunciated by the Supreme Court of the United States under the original Bankruptcy Act of 1898 and bearing in mind the provision of Section 302 of Article 1, Chapter XI, to the effect that:

"The provisions of Chapters I to VII, inclusive, of this Act shall, in so far as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purpose of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purpose of such application the date of the filing of an original petition under sec-

tion 322 of this Act and the date of adjudication shall be taken to be the date of the filing of the petition under sections 321 and 322 of this Act except where an adjudication had previously been entered."

and bearing in mind the provision of Section 1 of the original Bankruptcy Act (Subdivision 13):

"'date of bankruptcy,' 'time of bankruptcy,' 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed."

and Subdivision 24 of Section 1:

"'Petition' shall mean a document filed in a court of bankruptcy or with a clerk thereof by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named."

and bearing in mind that these provisions are in no wise inconsistent with Chapter XI, and bearing in mind the admittedly insolvent condition of the bankrupt Trans-Pacific Corporation and its associated corporations at the date of the filing of the petition, this belated demand for a jury trial on the issue of insolvency seems to us to be both frivolous and facetious. Let us suppose that instead of a bankruptcy proceeding, a creditor, citizen of Arizona, holding a promissory note against a debtor, citizen of California, in the sum of $5,000.00, filed an action at common law in the district of the debtor's residence and citizenship praying for judgment against him in the sum of $5,000.00. Let us assume that the debtor answered and admitted the execution of the note; that it was based on a valuable consideration; that it was due, owing and un-

paid, and judgment was entered against him on the pleadings. Could the debtor after filing such a pleading then assert he was entitled to a jury trial under the Seventh Amendment to the Constitution of the United States? Let us assume that a bankrupt was indicted for concealing assets in violation of Section 29-b of the National Bankruptcy Act, 11 U. S. C. A., Section 52-b, and upon his arraignment before the court pleaded guilty to the offense. When called up for sentence and asked if there was any legal reason to show why sentence should not be pronounced in accordance with the law, could such defendant be heard to say that notwithstanding his plea of guilty he was still entitled to a jury trial under the provisions of the Sixth Amendment to the Constitution of the United States? We believe that the court would direct an investigation into the sanity of the defendant were such a demand made. Yet here we have four bankrupts who have invoked the jurisdiction of the District Court, voluntarily seeking to stay their creditors' hands and compromise with them for fifty cents on the dollar and as to the time over which their debts could be collected, admitting their insolvency at the very threshold of the proceedings, and then raising the question of a Constitutional right to a trial by a jury of admitted facts regarding which no issue existed under their own sworn admissions.

It is well established that bankruptcy, operating on the equity side, follows equitable principles and rules where the proceedings are confined entirely to the Bankruptcy Court. It is true that in recovering debts receivable owed by the bankrupt estate the trustee is obliged to go into a court of competent jurisdiction and sue. That is outside of strictly bankruptcy administration and the defendant in such a suit does not lose his right to a trial by jury

if guaranteed him in the jurisdiction in which the suit is brought. The same may also be said of suits to recover preferences. It is, however, well established that proceedings of a purely bankruptcy nature between the trustee and creditors of the bankrupt who had filed their claims, or between the trustee and the bankrupt himself, are of an equitable nature and no right to trial by jury exists. The most radical application of this rule is in turnover proceedings where the trustee charges that the bankrupt is concealing assets and is failing or refusing to turn them over. The bankrupt having subjected himself to the jurisdiction of the Bankruptcy Court may be summarily brought before the Referee on an Order to Show Cause why he should not turn over concealed assets and after a hearing before the Referee, may be summarily ordered to turn such assets over if the court finds that he is concealing them. If he fails to do so he may be imprisoned for an indefinite period. He is not entitled to a jury trial.

In *Hirshfield v. Bryant,* C. C. A., 8th Circuit, 14 F. (2d) 931, 8 A. B. R. (N. S.) 599, the Circuit Court of Appeals for the 8th Circuit, in passing on a petition to revise under Section 24 of the Act of 1898 in which the bankrupt contended that he was entitled to a jury trial, said:

> "That none of the provisions of the Constitution of the United States or of the Constitution of the State of South Dakota cited by counsel secure to a bankrupt a trial of that issue by jury or prevent the enforcement by a court of equity of a decree of that character, which in its wisdom it makes, is no longer debatable and we dismiss these charges of error here. * * * The petition to revise must therefore be dismissed with costs, and it is so ordered."

That the Circuit Court of Appeals for the 8th Circuit should thus tersely dispose of the contention that a bankrupt was entitled to a trial by jury where in the language of Chief Justice Taft in *Oriel v. Russell,* 278 U. S. 358, 13 A. B. R. (N. S.) 121:

> "The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed."

indicates clearly the frailty of the bankrupts' contention that they were entitled to a jury trial on the much less dangerous question of their insolvency.

Judge Shiras, while a District Judge in the Northern District of Iowa before going on the bench of the Supreme Court of the United States, in the *Matter of Erik A. Christensen,* 101 Fed. 243, 4 A. B. R. 99, disposed of this question in the following language:

> "It is well settled that this provision of the Constitution does not apply to cases of admiralty or equity jurisdiction. Waring v. Clarke, 5 How. 441; Webster v. Red, 11 How. 437; Shields v. Thomas, 18 How. 253. It is equally well settled that proceedings in bankruptcy are of equitable cognizance, and therefore the provisions of the Seventh Amendment are not applicable thereto. Thus, in Barton v. Barbour, 104 U. S. 126, it is said:
>
> " 'The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing him, persons having claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of a trial by jury, considered as an absolute right, does not

extend to cases of equity jurisdiction. * * * So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods."

The rule in *Barton v. Barbour* was followed by the District Court of the United States for the Eastern District of Virginia in *In re Iden*, 35 Fed. Supp. 1020, at 1021, on the issue as to whether or not she was a farmer within the meaning of Subsection r of Section 75 of the National Bankruptcy Act. This rule was followed notwithstanding the fact that the facts in the case were of a pitiful nature in the extreme, amounting to the stripping of an aged woman of a small farm and her sole means of support. The judgment was affirmed without comment by the Circuit Court of Appeals which said:

"After the hearing the learned Judge below filed an able Opinion, 35 Fed. Supp. 1020, which is adopted as the Opinion of this court for the reasons appearing in the opinion of the court below.

The Order dismissing the Petition is accordingly affirmed."

In the same case on another appeal, *Iden v. New York Life Insurance Co.*, 107 F. (2d) 695, the court, in disposing of a hopelessly insolvent situation, as is the case here, said:

"We think it true of cases of this sort just as in proceedings under Section 75, Subdivision a-r of

the Bankruptcy Act, 11 U. S. C. A., Section 203, Subdivision a-r which were considered by us in Massey v. Farmers & Merchants National Bank and Trust Co., 4th Circuit, 94 Fed. (2d) 526, 531, that, 'the offer of composition must be made in good faith, and if the debtor is beyond all reasonable hope of financial rehabilitation and the proceedings * * * can have no effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset * * * the mere gesture of making sort of an offer with no reasonable expectation that it will be accepted is not sufficient; nor is an offer based only on roseate but illogical hopes of what the debtor may at some future time be able to do.'

The Order appealed from will be affirmed and the mandate will issue forthwith."

The case of *Barton v. Barbour,* 104 U. S. 126, from which we have quoted above is the leading case on the subject of the case at bar today and has never been reversed or modified.

The same rule was followed in *Moore v. Yampa Mercantile Co., et al.,* C. C. A., 8th Circuit, 287 Fed. 629, 1 A. B. R. (N. S.) 616, where the purported issue on which a jury trial was demanded was the issue as to whether or not the alleged bankrupt was or was not engaged chiefly in farming or the tillage of the soil, the court said:

"The only issues upon which a defendant in a petition for his adjudication in bankruptcy has the right to a trial by jury under Section 19a, are the question of his insolvency, and the question of his commission of an act or the acts of bankruptcy alleged in the petition. The trial of these two issues by a jury on the demand of the defendant must be according to

the ordinary course of common law and their trial is reviewable by an appellate court only by writ of error."

If the rule in the case is incorrect, then Section 19 of the Bankruptcy Act providing for a jury trial on the issues of insolvency and on the commission of an act of bankruptcy only, is unconstitutional if, as is contended here, Section 376, Subdivision 2, is in violation of the Seventh Amendment. If under the Seventh Amendment an alleged bankrupt is entitled to a trial by jury on the issues of insolvency and the commission of an act of bankruptcy, then he would be entitled to a trial by jury on the issue as to whether or not he was a farmer engaged chiefly in farming and the tillage of the soil, or in the event of a corporation, on the issue of whether or not it was a railroad, municipal or banking corporation, or in the case of either a corporate or natural person bankrupt, on the issue of the amount and validity of the petitioning creditors' claims. Along the same line see also *Stevens v. Merchants Bank,* 154 Fed. 341, 18 A. B. R. 560, and *Chandler v. Metomkin Bank and Trust Co.,* 86 F. (2d) 370, 32 A. B. R. (N. S.) 205.

In the *Matter of Marschall,* 287 Fed. 187, on the question of the right of a bankrupt's wife to a jury trial in the determination of exemptions in property, the court said at page 191:

"The objection is also made that this proceeding deprives both the bankrupt and his wife of a trial by jury, guaranteed by the Constitution of the United States (Article 3, Section 2, subd. 3). This contention is not, in my opinion, well taken. The bankruptcy court is a court of equity, and when proceeding pursuant to the proper jurisdiction of the

court will act in the light of the rule that, equity having taken jurisdiction of the subject-matter, it will administer all the rights of parties in and to the same. Again, this is the forum to which the bankrupt submitted his claim of homestead, and it is his right that is being adjudicated."

## Conclusion.

We respectfully submit that these allied bankrupts suffered no invasion of their Constitutional rights when Referee Hugh L. Dickson adjudged them to be bankrupts. As heretofore pointed out they had invoked the aid of the Bankruptcy Court to shield them from the weapons of their creditors, secured or unsecured, including the United States Government, to which they owed large amounts of unpaid taxes. They did not comply either with the letter or the spirit of Chapter XI of the Bankruptcy Act in procuring the acceptance by their creditors or the Government of their roseate plan of arrangement. Throughout the months in which they were dickering with the Government apparently hoping "to get high Washington connections which they did not have out here" (statement of Mr. Gendel, Referee's Certificate, p. 8), the Referee exercised a great deal of patience in according them every opportunity to work out their plan and in granting them repeated continuances. Patience finally ceased to be a virtue, and the Referee announced his intention to adjudicate these corporations bankrupt and put an end to the farce. The bankrupts inconsistently then demanded a jury trial on a non-existent phantom issue, namely, that of insolvency, which was admitted, and invoked a non-existent Constitutional right which has the effect of challenging a very vital part of the Bankruptcy

Act of 1898 and the amendment and revision thereof of 1938, forty years after the enactment of the original act.

We respectfully submit that the Orders and Judgments of the Referee and the District Court and the Circuit Court of Appeals were correct and that the Petition for Writ of Certiorari should be denied.

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